

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID FOWLER, et al.,
Plaintiffs,
v.
WELLS FARGO BANK, N.A.,
Defendant.

Case No. [18-cv-01254-MMC](#)

**ORDER DENYING IN PART AND
DEFERRING RULING IN PART ON
MOTION FOR RELIEF FROM
JUDGMENT AND ORDER GRANTING
MOTION TO DISMISS**

Before the Court is plaintiff David Fowler and Colisa McFadden's Motion, filed December 14, 2018, "for Relief from Judgment and Order Granting Defendant's Motion to Dismiss Plaintiffs' Complaint." Defendant Wells Fargo Bank, N.A. ("Wells Fargo") has filed opposition, to which plaintiffs have replied. Having read and considered the papers filed in support of and in opposition to the motion,¹ the Court rules as follows.²

By order filed November 14, 2018, the Court granted Wells Fargo's motion to dismiss plaintiffs' complaint and dismissed plaintiffs' claims without leave to amend, after which, on December 7, 2018, the Clerk of Court entered judgment. In the instant motion, plaintiffs assert that, as a result of excusable neglect on the part of plaintiffs' counsel, plaintiffs failed to make certain arguments in their opposition to the motion to dismiss, which arguments they now ask the Court to consider.

In their complaint, plaintiffs alleged the following three causes of action: (1) the

¹Plaintiffs failed to provide the Court with a chambers copy of their reply. Nonetheless, the Court has considered it. For future reference, plaintiffs are reminded that, pursuant to Civil Local Rule 5-1(e)(7) and the Court's Standing Orders, parties are required to provide for use in chambers one paper copy of each document that is filed electronically.

²By order filed January 15, 2019, the Court took the matter under submission.

1 First Cause of Action, titled "Violation of Cal. Civil Code § 2924, et seq.," by which
2 plaintiffs alleged Wells Fargo "caused a Notice of Trustee's Sale to be recorded" (see
3 Compl. ¶ 9), but failed to "post a copy of the Notice of Trustee's Sale to [p]laintiffs' door"
4 (see Compl. ¶ 14) and "mail the Notice of Trustee's Sale to [p]laintiffs via certified or
5 registered mail" at least "20 days before the date of the sale" (see Compl. ¶ 15); (2) the
6 Second Cause of Action, titled "Violation of Cal. Civil Code § 2923.7," by which plaintiffs
7 alleged Wells Fargo failed to "adequately advise [p]laintiffs of the status of their
8 application [for a loan modification]" (see Compl. ¶ 29), failed to "ensure that [p]laintiffs
9 were considered for all foreclosure prevention alternatives" (see id.), and failed to
10 "provide [p]laintiffs with an adequate single point of contact" (see Compl. ¶ 30); and
11 (3) the Third Cause of Action, titled "Unfair Competition – Violation of Business and
12 Professions Code §§ 17200 et seq.," by which plaintiffs alleged the conduct on which
13 they based the First and Second Causes of Action constituted "unlawful business
14 practices" (see Compl. ¶ 32) and "unfair business practices" (see Compl. ¶¶ 37-38).

15 In its motion to dismiss, Wells Fargo argued that plaintiffs' claims were, inter alia,
16 preempted by the Home Owners' Loan Act ("HOLA"), and the Court, in its order of
17 dismissal, agreed. Plaintiffs, relying on Rule 60(b)(1), argue that, as a result of a mistake
18 they assert is excusable, they failed to argue in their opposition that HOLA does not
19 preempt their First Cause of Action.³ See Fed. R. Civ. P. 60(b)(1) (providing court may
20 relieve party from judgment due to "mistake, inadvertence, surprise, or excusable
21 neglect").

22 Plaintiffs fail to cite any authority providing that a party's failure to make a legal
23 argument, where such argument is not based on a change of law or newly discovered
24 evidence, can constitute the type of omission sufficient to set aside a judgment, and, as
25 Wells Fargo points out, not only policy considerations, but existing authority as well,
26

27 ³Instead, plaintiffs, in their opposition, argued that national banks, such as Wells
28 Fargo, could not rely on HOLA.

counsel against allowing a party to do so. See, e.g., Castillo-Antonio v. Iqbal, 2017 WL 3335682, at *3-4 (N.D. Cal. August 4, 2017) (holding motion to set aside order granting summary judgment cannot be based on argument that movant's counsel, in opposing motion for summary judgment, failed to make argument counsel could have made).

In any event, in this instance, it would be futile to set aside the judgment and order of dismissal as to the First Cause of Action. Specifically, as Wells Fargo points out, courts that have considered the issue have found, and this Court agrees, that statutory claims challenging the manner in which a mortgagor provides notice of a trustee's sale are preempted by HOLA. See DeLeon v. Wells Fargo Bank, 729 F. Supp. 2d 1119, 1121, 1126 (N.D. Cal. 2010) (finding claim under § 2924b, alleging mortgagees "never received notice of a trustee's sale and that the notice of such a sale never was posted on the [p]roperty," preempted by HOLA); Stefan v. Wachovia, 2009 WL 4730904, at *3 (December 7, 2009) (finding claims challenging defendant's "initiation of the state foreclosure process under California Civil Code § 2924" preempted by HOLA); see also Frausto v. ING Bank, FSB, 2013 WL 12097535, at *6 (S.D. Cal. September 16, 2013) (holding claim for fraudulent concealment, where plaintiff alleged duty to disclose arose from defendant's failure to comply with duties set forth in § 2924b, preempted by HOLA).

Moreover, even if not preempted, the First Cause of Action is subject to dismissal. In particular, plaintiffs, in their complaint, acknowledged they had received a copy of the Notice of Trustee's Sale twenty days before the scheduled sale (see Compl. ¶¶ 9-10), and, as explained in an earlier order issued by the Court, "any failure by defendant to comply with § 2924b(b)(2) and/or 2924f(b)(3) was 'harmless,' and, consequently, 'is not actionable.'" (See Order, filed February 27, 2018, at 2:23-25 (quoting Falcocchia v. Saxon Mortgage, Inc., 709 F. Supp. 2d 860, 870 (E.D. Cal. 2010))); see also Lehner v. United States, 685 F.2d 1187, 1190-91 (9th Cir. 1982) (holding plaintiff failed to state cognizable claim alleging defendant United States mailed notice of foreclosure sale to "wrong address," where plaintiff had received actual notice of pending sale during "repeated conversations" with "government officials").

1 Accordingly, to the extent plaintiffs seek an order setting aside the judgment and
2 order of dismissal as to the First Cause of Action, the motion will be denied.

3 Plaintiffs' remaining argument is that, as a result of excusable neglect, they failed
4 to request leave to amend and, consequently, at this time seek leave to "add claims."
5 (See Pls.' Mem. of P. & A. at 3:24-25.) Plaintiffs have not, however, submitted a
6 proposed amended complaint, see Civil L.R. 10-1 (providing party "moving to file an
7 amended pleading must reproduce the entire proposed pleading"), nor have plaintiffs
8 otherwise advised the Court as to the nature of any proposed new claims they believe
9 they could add. Under such circumstances, the Court cannot determine whether leave to
10 amend would be futile. Nonetheless, the Court will defer ruling on this portion of plaintiffs'
11 motion and afford plaintiffs an opportunity to supplement their motion with a proposed
12 amended complaint.

13 CONCLUSION


14 For the reasons stated:

15 1. To the extent plaintiffs seek an order vacating the judgment and order of
16 dismissal as to the First Cause of Action, the motion is hereby DENIED.

17 2. To the extent plaintiffs seek an order vacating the judgment and order of
18 dismissal for the purpose of allowing plaintiffs to file an amended complaint, the Court
19 hereby DEFERS ruling. Specifically, plaintiffs may file, no later than February 8, 2019, a
20 proposed amended complaint, along with a supplemental brief, not to exceed five pages
21 in length, in support of their request to amend. If plaintiffs file such proposed amended
22 pleading, Wells Fargo shall file, no later than February 22, 2019, any response thereto,
23 not to exceed five pages in length. As of February 22, 2019, unless the parties are
24 otherwise advised, the deferred portion of plaintiffs' motion will be deemed submitted.

25 **IT IS SO ORDERED.**

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27 Dated: January 18, 2019

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MAXINE M. CHESNEY
United States District Judge